# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>August 9, 2005 |
| v | No. 254263<br>Wayne Circuit Court |
| LEO DENNIS GLOVER,<br><br>Defendant-Appellant. | LC No. 03-003196-03 |

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth-felony habitual offender, MCL 769.12, to concurrent prison terms of life without parole for the murder conviction and parolable life for the armed robbery and felon in possession convictions, as well as to a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that a new trial is required because the trial court failed to instruct the jury concerning the intent necessary to convict him of armed robbery as an aider and abettor. Defendant affirmatively waived this issue by expressing satisfaction with the instructions as given. *People v Carter*, 462 Mich 206, 215-220; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001). Even if we considered this claim of error as an unpreserved issue subject to review for plain error, see *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999), appellate relief would not be warranted. Contrary to defendant's argument, the record discloses that the trial court instructed the jury concerning both the intent necessary to convict him of armed robbery as a principal and as an aider and abettor. Regarding the latter, the court stated:

> [T]he defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission at the time of giving assistance. And it does not matter how much help, advice, encouragement the defendant gave. However, you must decide whether the defendant intended to help another commit the crime and whether his help, advice or encouragement actually did help, advise or encourage the crime.

Thus, defendant has failed to show plain instructional error. See *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993) (discussing aiding and abetting). Further, because the trial court properly instructed the jury on the intent necessary to convict defendant as an aider and abettor, defense counsel was not ineffective for failing to object. Counsel is not required to make a futile objection. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Next, defendant argues that the prosecutor committed misconduct by denigrating the defense in her rebuttal argument. We disagree.

Because defendant failed to object to the prosecutor's conduct, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764; *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Claims of prosecutorial misconduct are reviewed on a case by case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Defendant correctly observes that "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). "However, the prosecutor's comments must be considered in light of defense counsel's comments," and "[a]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id*. at 592-593 (internal citation and quotation omitted). In this case, during closing argument, defense counsel argued that a prosecution witness, Johnny Ray Moore, should not be believed and that the DNA evidence linking defendant to the murder weapon was not conclusive. On rebuttal, the prosecutor properly addressed defense counsel's arguments concerning the weight and credibility of the evidence, arguing that the evidence instead showed that defendant was guilty beyond a reasonable doubt. There was no misconduct and, accordingly, no plain error. Moreover, defense counsel was not ineffective for failing to object to the prosecutor's remarks. See *Kulpinski*, *supra* at 27.

Next, defendant argues, in a rather summary fashion, that his convictions of both felony murder and armed robbery violate his double jeopardy protections. Because defendant did not raise this double jeopardy issue in the trial court, we review the issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

As defendant argues, it is a violation of double jeopardy protections to convict and sentence him for both felony murder and the underlying felony. *People v Harding*, 443 Mich 693, 710-712, 714; 506 NW2d 482 (1993). However, there is no double jeopardy violation when the armed robbery and felony murder convictions are based on different victims. *People v Wilson*, 242 Mich App 350, 360-362; 619 NW2d 413 (2000). In this case, the record discloses that defendant's armed robbery conviction clearly was based on his participation in the robbery of Samuel Dowdell. The trial court's instructions reasonably apprised the jury that the felony murder conviction was based on the shooting death of Timothy Allen during the attempted robbery of Allen. See *id.* at 360-362. While the instructions were not perfect, no clear error

requiring reversal has been established in light of the precedential value of *Wilson, supra* at 360-362.[1]

Lastly, defendant argues that his trial attorney rendered ineffective assistance of counsel in failing to present at trial the allegedly exculpatory testimony of two individuals, Melvin Garrett and Keith Ross. Garrett, defendant's relative, submitted an affidavit in which he claimed that defendant was present at Garrett's house at the time of the crimes and therefore could not have committed them. Ross submitted an affidavit stating that he lied to the police when he told them that defendant was involved in the robbery and murder; he claims he made false allegations in order to get revenge on defendant for a situation involving Ross's girlfriend.[2] He states in the affidavit that defendant "was not with [sic] the night . . . when the [crimes were] committed."[3]

To prove ineffective assistance of counsel, a defendant must show "that his attorney's performance fell below an objective standard of reasonableness" and that his attorney's performance "so prejudiced him that he was deprived of a fair trial." *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). In determining the reasonableness of an attorney's performance, a defendant faces a strong presumption that the attorney's actions were reasonable and constituted sound trial strategy. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Grant, supra* at 485. For a defendant to prove that he was deprived of a fair trial, there must be "a reasonable probability that the outcome [of the trial] would have been different but for counsel's errors." *Grant, supra* at 486.

Defendant has simply not established that his attorney's performance fell below an objective standard of reasonableness. With regard to the attorney's failure to call Garrett as a witness, there is no evidence that defendant, Garrett, or anyone else notified the attorney about defendant's alleged alibi. Accordingly, there is no evidence that the attorney acted unreasonably in failing to call Garrett as a witness. Defendant had an obligation to assist in his own defense, see *People v Tommolino*, 187 Mich App 14, 17-18; 466 NW2d 315 (1991), and this assistance would include notifying his attorney of an alibi witness.

With regard to Ross's testimony, defendant has once again failed to prove that his attorney's performance fell below an objective standard of reasonableness. Indeed, defendant has presented no evidence that Ross would have been willing to testify at trial on defendant's behalf. Nor has defendant presented evidence that his attorney was aware of Ross's recantation. Defendant's jury trial ended on January 26, 2004, and Ross did not complete his affidavit recanting his earlier testimony until April 21, 2004. There is no evidence that he made the

---

[1] The prosecutor initially claimed, when discussing the felony murder charge during closing arguments, that the predicate felony was the armed robbery of Dowdell. The prosecutor then mentioned, however, the robbery attempt on Allen. While the prosecutor's argument could have been clearer, reversal is not warranted in light of *Wilson, supra* at 360-362.

[2] Ross previously pleaded guilty to a reduced count of second-degree murder and testified during his plea hearing that defendant shot and killed the murder victim.

[3] Presumably, Ross meant to say in the affidavit that defendant was not at the scene when the crimes were committed.

recantation earlier than the date of the affidavit.

Because there is no evidence that defendant's trial attorney performed unreasonably, defendant's ineffective assistance claim must fail. *Grant, supra* at 485.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens